Supreme Court, U.S.
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No. 93-1189

In The

Supreme Court of the United States

October Term, 1993

HANJIN CONTAINER LINES, INC. (once known as Korea Shipping Corporation) for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU),

Petitioner,

vs.

TOKIO MARINE & FIRE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CO., LTD.; COMPASS INTERNATIONAL, INC.; JANKA, INC.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC. dba WHOLESALE WORLD; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL W. LODWICK
Counsel of Record
FISHER & PORTER
110 Pine Avenue, 11th Floor
Long Beach, California 90802
310/435-5626
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the court of appeals err when it held that respondents were entitled to enforce claims for the loss of their goods under petitioner's bills of lading, which defined the parties bound by their terms to include "the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading"?

2. Did the court of appeals err when it held that petitioner was not entitled to limit its liability to less than $500 per package as required by section 4(5) of the Carriage of Goods by Sea Act, when the goods were shipped in packages, the packages were stowed in containers, and petitioner's bills of lading listed the number of packages in each container?

3. Did the court of appeals err when it held that it lacked jurisdiction to review the *in rem* judgments against the ocean vessel M/V HANJIN YOSU on the grounds that the vessel and petitioner are not the same juristic person, their liabilities and the judgments against them differ, and the vessel was not named as an appellant in petitioner's notice of appeal?

4. If petitioner neither established ownership of the M/V HANJIN YOSU nor filed claim to the vessel, may it nonetheless obtain review of this jurisdictional ruling on the theory that it filed the notice in the dual capacities of defendant and claimant of the vessel?

PARTIES TO THE PROCEEDING

Some of the parties are identified incorrectly in the caption of the petition:

"Tokio Fire & Marine Ins. Co., Ltd." is Tokio Marine & Fire Insurance Co., Ltd.

"Compass International" is Compass International, Inc.

"Janka, Ltd." is Janka, Inc.

RULE 29.1 STATEMENT

The following respondents have the listed parent and subsidiary companies:

Rockwell International Corporation
- Allen-Bradley Company
- Rockwell-Collins International Inc.
- Rockwell-Graphic Systems
- Rockwell International Finance Corporation

Newell Company
- Newell Operating Company
- Newell Industries Canada, Inc.
- EZ Painter Corporation
- Masterset Brushes, Inc.
- Anchor Hocking International Corporation
- Anchor Hocking Corporation
- Sanford Corporation
- W.T. Rogers

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Petitioner,

vs.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondents are dissatisfied with the following references in petitioner's statement of jurisdiction:

(1) Supreme Court Rule 20.4 specifies the requirements for a petition seeking the issuance of a writ of habeas corpus, not a writ of certiorari.

(2) The applicable jurisdictional grant appears in 28 U.S.C. § 1254(1), not § 1254(a).

(3) Supreme Court Rule 17.1 [there are no subparts (a) and (c)] applies to actions brought within the Court's original jurisdiction.

STATUTES INVOLVED

Respondents are dissatisfied with petitioner's presentation of the statutes involved:

Neither petitioner nor any respondents are "non-vessel-operating common carriers" as defined in the Shipping Act, § 3(17), 46 U.S.C. § 1702(17) (1988). None of the rights, obligations, liabilities, causes of action or remedies asserted in this proceeding arises under any provision of the Shipping Act or falls within the Commission's jurisdiction.

As the relevant bills of lading were issued for the transportation of goods from a place in a foreign country to a place in the United States, the Pomerene Act [Federal Bills of Lading Act] does not apply. Pomerene Act, § 1, 49 U.S.C. § 81 (1988).

Petitioner's appendix includes § 4(5) of the Carriage of Goods by Sea Act ("COGSA"), §§ 1-16, 46 U.S.C. §§ 1300-1315 (1988). Respondents wish to add COGSA, § 3(4), § 1303(4), and COGSA, § 3(8), § 1303(8). These appear in appendix A of this brief.

Respondents also wish to add Rules B(1) and C of the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. Supp. R. B(1), C, 28 U.S.C. (1988). These appear in appendix B of this brief.

STATEMENT OF THE CASE

Respondents sustained losses when their cargoes aboard the M/V KOREAN WONIS ONE, later renamed the M/V HANJIN YOSU, were damaged by flooding in the ship's number three hold on the voyage from South Korea to Los Angeles, California. The crew admitted seawater to the ship's ballast tank in way of the number three hold and the water entered the hold through an open manhole used for access to the ballast tank. The manhole cover had negligently been left open several days before, but went unnoticed until after the loss.

Korea Shipping Corp., Ltd. ("Korea Shipping"), averring ownership of the vessel, filed a petition for exoneration from or limitation of liability under the provisions of 46 U.S.C. § 183 (1988), seeking to limit its liability for the resulting cargo losses to the value of the vessel and her pending freights. The district court properly denied the petition because the limitation fund exceeded the total value of all the claims for cargo loss. *In re Korea Shipping Corp.*, 1990 A.M.C. 190 (C.D. Cal. 1989), *aff'd*, 919 F.2d 601 (9th Cir. 1990), *cert. denied sub nom. Hanjin Container Lines, Inc. v. Tokio Marine & Fire Ins. Co.*, 499 U.S. 961 (1991).

After the limitation petition was dismissed by the district court, respondents sued the M/V HANJIN YOSU (since renamed) *in rem*, and brought *in personam* claims against Korea Shipping as her owner and against Korea Shipping and Hanjin Container Lines, Inc. as the carriers who issued the bills of lading for respondents' goods.

Answer was filed on behalf of Hanjin Shipping Company, Ltd. as successor to Korea Shipping and on behalf of the M/V HANJIN YOSU. Though Hanjin Shipping Company, Ltd. answered as owner of the vessel, it never filed a claim to the vessel pursuant to Fed. R. Civ. P. Supp. R. C(6). After trial, the district court entered judgments in respondents' favor against the M/V HANJIN YOSU *in rem* and against the carriers who issued the bills of lading, Korea Shipping and Hanjin Container Lines, Inc., *in personam*.

The Ninth Circuit affirmed the *in personam* judgments against petitioner and Korea Shipping, and determined *sua sponte* that it lacked jurisdiction to review the *in rem* judgments against the M/V HANJIN YOSU because the vessel had not been named an appellant in the notice of appeal. *All Pacific Trading, Inc. v. Vessel M/V HANJIN YOSU*, 7 F.3d 1427 (1993).

Now appearing for itself and for the vessel, petitioner seeks a writ of certiorari in respect of three rulings by the court of appeals: (1) that respondents were entitled to sue for their losses under petitioner's bills of lading; (2) that petitioner's liability was statutorily limited to $500 per package for the number of packages listed on each of the bills; and (3) that a vessel and her owner are not one and the same for purposes of naming the parties taking an appeal.

It is not clear who owned the M/V HANJIN YOSU or who is entitled to appear on her behalf. Korea Shipping asserted ownership in the limitation proceeding, 1990 A.M.C. 190, 919 F.2d 601, 499 U.S. 961. When Korea Shipping petitioned for certiorari, it represented that it was "now known as Hanjin Container Lines, Inc." Pet. in No. 90-1329. Yet when Hanjin Container Lines was named

in these proceedings, it answered as Hanjin Shipping Company, Ltd., which averred that it owned the vessel. Although Hanjin Shipping Company answered for the vessel, it did not file a claim to the vessel, which Fed. R. Civ. P. Supp. R. C(6) makes a prerequisite to obtaining the standing necessary to answer for the vessel. The notice of appeal identified Hanjin Container Lines, Ltd. (later "Inc.") and Korea Shipping as separate entities but did not aver that either owned the vessel. The appellants' opening and reply briefs in the Ninth Circuit were filed by Hanjin Container Lines, Ltd./Inc. and by the M/V HANJIN YOSU. As the latter was not named in the notice of appeal, the Ninth Circuit requested supplemental memoranda on the question of whether the vessel was in fact a party appellant. Hanjin Container Lines, Inc. responded that it was the vessel owner, a position it maintains on this petition.[1]

REASONS FOR DENYING THE PETITION

A. There are no reasons for a review on writ of certiorari.

The petition presents no special and important reasons for granting the writ. It conjures conflicts in the circuits where none exist. It forecasts confusion if the decision is allowed to stand. It exhorts this Court to make rulings which would in fact make changes in the law – changes which are neither indicated nor desirable to the maritime sector, and which would overrule decades, in some cases centuries, of carefully laid precedent.

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[1] Petitioner states that it was sued as the corporate owner of the vessel, Pet. at 18, but fails to advise that the answer was filed in the name of Hanjin Shipping Company, Ltd. (CR 4)

The petition reads colorfully, but the colors tend to blur. The boundary between the first and second questions is far from sharply drawn. The second question presented soon becomes the first, as the petition reverts from customary freight units to privity, Pet. at 16, and then dissolves into a generalized plea for clarification of "burning questions in maritime commercial law." Pet. at 18. What needs clarifying is the petition, not the law. Citation to authority is at best infrequent, and frequently unreliable. The Reasons for Granting the Petition include references, in question 1, to many inapposite cases and a statute which, by its own terms, does not apply.[2] No conflict or any other special and important reason is given for the presentation of question 2. Question 3, like question 1, chases after illusory conflicts with other circuits as well as with prior rulings of this court.

The rationale for the petition is even weaker. The court of appeals is charged with having decided one issue differently than the First and Second Circuits, Pet. at 6, and another differently than the Fifth and Tenth. Pet. at 21-22. The Reasons for Granting the Writ begin with an ominous heading, which reads in part, "The Ninth Circuit Is In Irreconcilable Conflict With The First, Second And Third Circuits As To A Matter On Which National Uniformity Is Essential." Pet. at 7.

National uniformity is not in issue, for the decision does not conflict with any of the cases petitioner cites from other courts of appeals. The following comparison reveals no conflicts at all. Apart from purported conflicts

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[2] The Pomerene Act [Federal Bills of Lading Act], § 32, 49 U.S.C. § 112 (1988), does not apply to bills of lading issued in foreign countries. *See* Pomerene Act, § 1, 49 U.S.C. § 81.

that do not exist, the petition gives no special and important reasons why the decision below should be reviewed. It thus fails to meet the requirement of Sup. Ct. R. 10.1 and should therefore be denied.

1. Question 1 does not raise a conflict in the circuits.

The court of appeals in this proceeding held that respondents, as owners of the goods, were entitled to sue the ocean carrier in whose custody the goods were damaged, and to bring that suit under the ocean carrier's own bills of lading, to which they were deemed to be parties. *M/V HANJIN YOSU*, 7 F.3d at 1432. This is not in conflict with the cases petitioner cites: In *Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974), the First Circuit held that an ocean carrier's bills of lading did not control the contractual dispute between a shipper and a non-vessel-owning common carrier ("NVOCC") under bills of lading issued by the latter. In *Insurance Co. of North America v. S/S AMERICAN ARGOSY*, 732 F.2d 299, 302-03 (2d Cir. 1984), the Second Circuit held that a vessel was not liable *in rem* for the breach of an NVOCC's bill of lading because the NVOCC had not chartered the vessel and the vessel therefore had not ratified the bill of lading. Nowhere in its opinion did the Ninth Circuit conflict with *Fireman's Fund* or *AMERICAN ARGOSY*. It did not hold an NVOCC liable under the ocean carrier's bill of lading – or vice versa; it held the ocean carrier liable under the very bills it issued. It did not hold the HANJIN YOSU liable for breach of an NVOCC's bill of lading; it held the vessel liable for the breach of bills issued by petitioner, who was both the vessel's charterer and the ocean carrier.

Petitioner plainly equivocates about the asserted Third Circuit conflict: "A slightly different rule may exist in the Third Circuit as a result of *SPM Corp. v. MING MOON*, 965 F.2d 1297 (3d Cir. 1992)." Pet. at 10. Not so: *MING MOON* is a deviation case that does not touch on any of the questions presented for review. It has a package limitation issue, but not, as here, between packages and customary freight units; instead, between the $500 per package limitation and a higher one. Its only possible relevance to question 1 is that the Third Circuit construed the terms of the carrier's bill of lading strictly, as the law requires.[3] *MING MOON* thus held the ocean carrier bound to its own provision for a higher package limitation than the COGSA minimum. Similarly, the Ninth Circuit in this case held petitioner and Korea Shipping to their own definition of "Merchant," as discussed in section 1 below. There is no scent of conflict here.

2. Question 2 cites no authority for what it proposes, and thus raises no conflict.

Only one case is cited in petitioner's argument of question 2, *S/S AMERICAN ARGOSY*, 732 F.2d 299. *See* Pet. at 16. Petitioner cites it for the proposition that a shipper is required to sue its NVOCC and not permitted to sue the actual ocean carrier because the latter would not be able to know the contents of an ocean container and assess whether to buy insurance for its liability. Pet. at 17. This novel misinterpretation of *AMERICAN*

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[3] C-Art, Ltd. v. Hong Kong Islands Line America, S.A., 940 F.2d 530, 532 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1762 (1992); Interocean S.S. Corp. v. New Orleans Cold Storage & Warehouse Co., 865 F.2d 699, 703 (5th Cir. 1989).

ARGOSY is spawned by petitioner's mistaken belief that the case permits a cargo owner to sue only the NVOCC, not the ocean carrier. As discussed above, *AMERICAN ARGOSY* holds that a vessel owner that has chartered its vessel to an ocean carrier is not bound by the terms of a bill of lading issued by an NVOCC that has not chartered the vessel. *Id.* at 302-03. The case goes on to say that a carrier, by which it presumably means a vessel owner who becomes a COGSA carrier by virtue of authorizing the chartering ocean carrier to issue bills of lading, ought not have its liability determined by the terms of numerous NVOCC bills of lading. *Id.* at 304.

Nothing in the opinion below conflicts with this. The court of appeals held petitioner and Korea Shipping – the ocean carriers who issued bills of lading – liable under their own bills of lading. No defendant, no appellant was held liable under any other bill of lading than its own.

3. Question 3 charges conflicts with rulings of this Court and of other circuit courts; the purported conflicts do not exist.

Petitioner's third question charges that this decision conflicts with Fifth and Tenth Circuit interpretations of this Court's holding in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Pet. at 21-22. Petitioner does not contend that the court of appeals departed from *Torres*, rather that it interpreted *Torres* differently than the Fifth and Tenth Circuits. The issue on this petition concerns the mechanics of taking an appeal from an *in rem* judgment against a vessel. Must the vessel be named as a party taking the appeal? Petitioner says No; the Ninth Circuit said Yes. The court of appeals held that the M/V HANJIN YOSU is a juristic person separate and distinct from her

owner and claimant, and must therefore be named as a party taking the appeal.

The pretended conflicts with Fifth and Tenth Circuit decisions are chimerical. The cited cases hold that when an individual appears in more than one capacity, as for example a plaintiff and a guardian *ad litem*, she need name herself only once in the notice of appeal, and not separately for each of her capacities. *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992); *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990), *aff'd on reh'g*, 944 F.2d 732 (10th Cir. 1991); *King v. Otasco Inc.*, 861 F.2d 438 (5th Cir. 1988). In *Torres*, however, this Court faced the very different question of whether the omission of a separate defendant's name constituted a failure to appeal. This Court ruled that this *was* a failure to appeal. The M/V HANJIN YOSU was a defendant in her own right, not a "capacity" of petitioner. She was sued *in rem* for a liability arising from a maritime lien. That lien could be enforced against the HANJIN YOSU alone, not against her owner or claimant. This was not a matter of one defendant in two capacities, but of two defendants. Thus, the ruling does not conflict with the cited decisions from other circuits.

The holding that the M/V HANJIN YOSU is a separate juristic entity from her owner, says petitioner, also "conflicts with prior admiralty rulings of this Court. . . ." Pet. at 22. These prior rulings are given as *The CITY OF NORWICH*, 118 U.S. 468 (1886) and *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960). *The CITY OF NORWICH* did not hold that a vessel is not a separate juristic entity from her owner. It held that when an owner may be liable *in personam* and its vessel may be liable *in rem* for the same loss, discharge of the owner operates to discharge the vessel as well. 118 U.S. at 503-04. Since

there was but one loss, and the vessel's liability derived from the owner's liability, the rule makes sense; but it does not make the vessel and the owner one and the same. On the contrary, long afterward this Court has continued to emphasize that the vessel is a separate juristic entity. *The THOMAS BARLUM*, 293 U.S. 21 (1934).

The FBL-585 is a different matter. When it came to enabling or frustrating the transfer of an action under 28 U.S.C. § 1404(a), this Court decided that a vessel owner should not be required to defend itself and its vessel in different fori. The Ninth Circuit expressly considered *The FBL-585* and discerned that the congressional policy favoring a convenient forum, in this Court's view, should be served despite the distinction between the vessel and her owner. *M/V HANJIN YOSU*, 7 F.3d at 1431. There is no countervailing policy, however, in Fed. R. App. P. 3(c)'s requirement that each party taking an appeal be named in the notice of appeal. It is not a matter of convenience, but of jurisdiction. The M/V HANJIN YOSU clearly and unequivocally appeared as a party in the district court. *See* the answer filed by the vessel (CR 4). She also appeared as a party in the court of appeals. *See* the opening and reply briefs. The vessel's name appeared on the briefs but was absent from the notice, thus prompting the court's determination that it lacked jurisdiction to hear the vessel's appeal. Now, says petitioner, the vessel no longer is a party, a defendant, an appellant, a separate juristic entity – she is a "capacity" of her owner.

Centuries of maritime law and the procedural rules promulgated by this Court for the enforcement of maritime liens alike view the ship as a juristic entity separate from her owner or claimant. In so holding, the court of

appeals followed the law as everyone except petitioner knows it. This is not a case "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)(interpreting the predecessor of Sup. Ct. R. 10.1). Indeed, this is a case, like *Layne & Bowler*, where there is no conflict at all. 261 U.S. at 392. Petitioner has failed to present any special and important reason why the petition should be granted.

Besides denial because it fails to meet the requirements of Sup. Ct. R. 10.1, the petition should be denied on the merits. As discussed in the four points below, the court of appeals applied the law correctly, and its decision should not be reviewed.

B. The petition should be denied on the merits.

1. Respondents are entitled to recover for the loss of their goods under petitioner's bills of lading, which defined the parties bound by their terms to include "the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading."

Respondents owned the goods that were carried and damaged aboard the M/V HANJIN YOSU. Each shipment of goods was carried from South Korea to Los Angeles under two bills of lading – one issued by an NVOCC, with whom the shipper dealt; the other, by an ocean carrier, to whom the NVOCC entrusted the goods for actual carriage aboard the ship. Two different ocean carriers – petitioner Hanjin Container Lines and Korea Shipping – issued their own bills of lading, naming as shipper the NVOCC who delivered them the goods. In

accepting petitioner's and Korea Shipping's bills of lading, the NVOCCs were acting as agents for the owners of the goods. *S/S AMERICAN ARGOSY*, 732 F.2d at 301; *Modern Office System, Inc. v. AIM Caribbean Express, Inc.*, 802 F. Supp. 617, 623 (D.P.R. 1992). The bills accepted by the NVOCCs were binding on the owners of the cargo. Respondents became bound because the NVOCCs acted as agents in delivering the goods to the actual carrier, *S/S AMERICAN ARGOSY*, 732 F.2d at 301, and because the terms of petitioner's and Korea Shipping's bills of lading so provided. *M/V HANJIN YOSU*, 7 F.3d at 1432. Each bill of lading was statutorily subject to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1988)("COGSA"); none was subject to the Pomerene Act, 49 U.S.C. §§ 81-124 (1988), as petitioner wrongly argues (Pet. at 11).

The bills of lading issued by petitioner and Korea Shipping used the term "Merchant" to describe the various parties who were or might ultimately become interested in the goods. Each bill of lading specified the rights, obligations and liabilities of the "Merchant"[4] under the bill of lading and defined "Merchant" as including "the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading." 7 F.3d at 1432. Petitioner and Korea Shipping drafted the boilerplate provisions of their bills, and these were contracts of adhesion, to be "strictly construed against the carrier." *Interocean S.S. Corp.*, 865 F.2d at 703. The district court held that respondents, having proved themselves owners

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[4] The court of appeals noted that each bill of lading "goes on to use the term Merchant approximately seventy-seven times." M/V HANJIN YOSU, 7 F.3d at 1432.

of the goods carried under petitioner's and Korea Shipping's bills of lading, were "Merchants" within the meaning of those bills and were entitled to recover from the issuing carriers for the loss of their goods. The Ninth Circuit agreed. *M/V HANJIN YOSU*, 7 F.3d at 1432.

Petitioner argues that as respondents received bills of lading from the various NVOCCs to whom the goods were sent for shipment, and as the NVOCCs were named as shippers on petitioner's and Korea Shipping's bills of lading, respondents should be forced to sue the NVOCCs and be barred from suing the actual ocean carriers. Petitioner does not address the court of appeals' conclusion that respondents may sue as "Merchants" within the meaning of petitioner's and Korea Shipping's bills of lading. Rather than explain why its bills of lading should not be enforced as it wrote them, petitioner argues only that respondents did not become transferees of the bills in the manner provided by the Pomerene Act, § 32, 49 U.S.C. § 112. Pet. at 11-13.

The Pomerene Act does not apply to bills of lading issued in a foreign country. As Congress wrote it, the act applies only to bills of lading issued in the United States. Pomerene Act, § 1, 49 U.S.C. § 81; *Elgie & Co. v. S.S. S.A. NEDERBURG*, 599 F.2d 1177, 1180 (2d Cir. 1979), *cert. denied sub nom. South African Marine Corp. v. Elgie & Co.*, 444 U.S. 1072 (1980); *The CARSO*, 43 F.2d 736, 744 (S.D.N.Y. 1930), *modified on other grounds*, 53 F.2d 374 (2d Cir.), *cert. denied sub nom. Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc.*, 284 U.S. 679 (1931). Petitioner contends that the Ninth Circuit has held that Pomerene "applies to imports too." Pet. at 11 n.4. This is wrong. *Cf.* the case petitioner cites, *Portland Fish Co. v. States S.S. Co.*, 510 F.2d 628, 631-32 & n.7

(9th Cir. 1974)(holding that the act by its own terms does not apply to bills of lading issued in foreign countries). The Eleventh Circuit, petitioner notes correctly, has held that Pomerene applies to bills of lading issued outside the United States – a remarkable holding when compared with the language of section 1 of the act, 49 U.S.C. § 81. *United States v. Castro*, 829 F.2d 1038, 1050 (11th Cir. 1987), *modified*, 837 F.2d 441 (11th Cir. 1988). In its first opinion, the Eleventh Circuit disagrees with the literal meaning of section 1 and with decisions in which the Second and Ninth Circuits defer to that language.[5] 829 F.2d at 1050. The Eleventh Circuit later modified this ruling by elaborating reasons why it believes that "[t]he scope of section 121 [§ 41 of the act] is broader than what is expressly set out in section 81 [§ 1]." 837 F.2d at 445. Though the Eleventh Circuit's decision creates a circuit conflict about whether section 41 of the Pomerene Act applies to foreign-issued bills of lading, that conflict was created by the Eleventh Circuit, not the Ninth, and is a conflict not before this Court, despite petitioner's attempt to make it the cornerstone of its petition.

The thrust of petitioner's argument, pinned to a definition in the Shipping Act and provisions of the Pomerene Act which have no application here, is that respondents may not sue petitioner because petitioner issued nonnegotiable bills of lading. Pet. at 12-13. Negotiability, however, is unrelated to liability; it is a mechanism for transferring title. There is no question that respondents owned the goods; no question that as owners

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[5] The Ninth Circuit case that *Castro* is at pains to distinguish is in fact *Portland Fish*. *See Castro*, 829 F.2d at 1050 n.36.

they are "Merchants" under petitioner's and Korea Shipping's bills of lading. These facts entitle respondents to sue as they did. That they could also have sued the NVOCCs, whose liability for the flooding would have been vicarious, does not vitiate respondents' right to sue petitioner and Korea Shipping as "Merchants" under the express terms of their bills of lading.

Petitioner's argument that the Ninth Circuit's decision is in conflict with decisions of the First and Second Circuits, and possibly the Third, is based upon a frank misstatement of the rulings cited from those circuits. The authority with which the Ninth Circuit supposedly is at odds does not support petitioner's claims. These circuits have *not* held, as petitioner avers, "that an injured cargo owner may not sue the underlying vessel owner or his vessel directly, but may only sue his own ocean carrier, the NVOCC." Pet. at 10. As discussed in section A *supra*, pp. 7-8: (1) The First Circuit held that a shipper's suit against its NVOCC was governed by the terms of the NVOCC's bill of lading, not by those of the ocean carrier's bill. *Fireman's Fund*, 492 F.2d at 1296. (2) The Second Circuit held that a shipper could not hold the vessel owner liable for breach of the NVOCC's bill of lading since the vessel owner had not ratified or become otherwise bound to the NVOCC's bill, being bound instead to the ocean carrier's bill. *S/S AMERICAN ARGOSY*, 732 F.2d at 301-02. (3) The Third Circuit dealt with issues of deviation and package limitation, not with who may sue whom. *M/V MING MOON*, 965 F.2d 1297.

It bears adding that the district court opinion which petitioner cites as "[b]uilding on" *AMERICAN ARGOSY* does not support petitioner. It holds that the vessel owner will not be liable for the breach of the NVOCC's bill of

lading because the NVOCC is "an agent of the shipper and accordingly, merely a customer, one of many on a given voyage." *Ultimo Cabinet Corp. v. M/V MASON LYKES*, 1991 A.M.C. 1343, 1345 (S.D.N.Y. 1991)(citing *AMERICAN ARGOSY*, 732 F.2d at 301)).

None of petitioner's citations supports the argument that the cargo owner may not sue the vessel owner, the ship or the ocean carrier directly. They rule that the cargo owner may not hold them liable *under an NVOCC's bill of lading*. Subject to authorization, the ship and her owner are bound not by the NVOCC's bill but by the ocean carrier's – and may only be sued for breach of the ocean carrier's bill, as respondents sued them here. Petitioner's pretended conflict in the circuits does not exist. The only cases offered to show a conflict are plainly inapposite, and the petition should be denied.

2. Petitioner is not entitled to limit its liability to less than $500 per package as provided by section 4(5) of COGSA because the goods were shipped in packages stored in containers and petitioner's bills of lading stated the number of packages in each container.

COGSA entitles the carrier and the ship to limit liability for loss of or damage to goods to $500 per package, or $500 per customary freight unit if the goods are not shipped in packages. COGSA, § 4(5), 46 U.S.C. § 1304(5). Pet., App. B-1. Respondents' goods *were* shipped in packages. The packages were delivered to NVOCCs who loaded them into containers and delivered them to petitioner and Korea Shipping. *M/V HANJIN YOSU*, 7 F.3d at 1433. Petitioner admits that respondents

shipped the goods in packages with the NVOCCs. Pet. at 16.

Because the NVOCCs loaded packaged goods into various containers before delivering them to the ocean carriers, petitioner asserts that the carriers did not receive or carry goods shipped in packages but instead received and carried only containers. Arguing nebulously that by carrying containers they carried "goods not shipped in packages" within the meaning of COGSA § 4(5), 46 U.S.C. § 1304(5), petitioner contends that they are entitled to the limitation that COGSA provides for goods not shipped in packages – a limitation of $500 per customary freight unit. As the customary freight unit used by petitioner and Korea Shipping was the "TEU" (*i.e.*, *T*wenty-foot *E*quivalent *U*nit), a reference to twenty feet of container length, petitioner contends that their liability should be limited to $500 for twenty-foot-long containers and $1,000 for forty-foot-long containers.

The argument that packaged goods in containers are "goods not shipped in packages" is a novel argument on this petition. In the court of appeals, petitioner claimed entitlement to limited liability of $500 per container on the theory that each container *was itself a package*. The court of appeals rejected this contention because petitioner's bills of lading recited the number of packages in each container. *M/V HANJIN YOSU*, 7 F.3d at 1433. Now urging its newest theory, petitioner asks this Court to rule that as a matter of law goods shipped in packages inside a container are "goods not shipped in packages" within the meaning of COGSA § 4(5). Pet. at 16. In requesting this ruling, petitioner omits to mention that its bills of lading and those of Korea Shipping actually stated the number of packages in each container. The court of

appeals considered this fact dispositive: "[T]he plain language of the bills of lading indicate[s] that the carrier understood that it was shipping packages, and not containers." 7 F.3d at 1433.

Seeking the writ to review a question that is "ripe for determination," Pet. at 18, petitioner asks this Court to discard the fact that the bills of lading listed the number of packages carried. It asks this Court instead to find that respondents' goods, admittedly in packages when delivered to the NVOCCs, somehow ceased to be in packages on being stowed in containers, and became instead "goods not shipped in packages" within the meaning of COGSA § 4(5). Just how the packages were thus transmogrified petitioner does not say. This remains an empirical riddle.

3. The court of appeals lacked jurisdiction to review the *in rem* judgments against the M/V HANJIN YOSU because the vessel and petitioner are not the same legal entity and the vessel was not named as an appellant in petitioner's notice of appeal.

The idea that a nonsentient object can have legal capacity is, to say the least, sophisticated. Yet the concept of vessel as juristic person is one of the underpinnings of admiralty law in this country, and is as old as the Constitution. Petitioner's dismissive treatment of this concept misstates the law. In the admiralty, a vessel *is* a juristic person and may be sued as such and adjudged liable whether her owner is liable or not. A vessel's *in rem* liability for cargo loss arises from the fact that the loss occurred aboard the ship. The loss gives rise to a maritime lien. There is but one way to assert the lien: by

proceeding in the district court against the vessel *in rem*, as provided by Fed. R. Civ. P. Supp. R. A and C. *Pioneer Import Corp. v. The LAFCOMO*, 49 F. Supp. 559 (S.D.N.Y.), *aff'd*, 138 F.2d 907 (2d Cir. 1943), *cert. denied sub nom. Black Diamond Lines v. Pioneer Import Corp.*, 321 U.S. 766 (1944). The lien may not be enforced otherwise, nor against any party but the vessel. Judgment may issue only from the district court, and only against the ship, and may be enforced only against the ship or such security as has been substituted for her. Hence the "personification" of the vessel – her recognition as a juristic person, albeit inanimate property.

As inanimate property lacking sentience, a vessel cannot actively commit a tort or breach a contract. Yet she can and does become liable for the torts and contract breaches of those in lawful possession of her, as surely as if she had done them herself. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224-25 (1945). The Federal Maritime Lien Act, for example, provides for liens against the vessel for the authorized furnishment of necessaries to the ship. 46 U.S.C. §§ 31341-31343 (Supp. 1989).

The ship's liability derives from her involvement in the tortious conduct or breach of contract of persons in lawful possession, *Churchill v. F/V FJORD*, 892 F.2d 763 (9th Cir. 1988), *cert. denied*, 497 U.S. 1025 (1990), *appeal after remand*, 5 F.3d 374 (9th Cir. 1993), as well as of others not so lawful, *The JOHN G. STEVENS*, 170 U.S. 113, 121 (1898). If the owner breaches a tort or contract duty in which the vessel is involved, such as colliding negligently with another ship or failing to deliver cargo in the same condition in which it was received, then the vessel is liable *in rem* for the owner's breach.

It is not necessary that the owner be liable *in personam* for the vessel to become liable *in rem*. *Cavcar Co. v. M/V SUZDAL*, 723 F.2d 1096, 1101 (3d Cir. 1983); *Merchants Nat'l Bank of Mobile v. Dredge GENERAL G.L. GILLESPIE*, 663 F.2d 1338, 1346 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982). There are breaches of duty for which a vessel will be liable and her owner not. If the owner charters the ship to another, the charterer's breach of duty will visit liability upon the ship, though not upon the owner. For example, a charterer/COGSA carrier's liability for loss of goods will make the vessel liable *in rem*, but the vessel owner's liability will depend on whether it, too, was a COGSA carrier, and that will depend on whether the carrier's bill of lading was signed on behalf of the owner or master of the vessel. *M/V SUZDAL*, 723 F.2d at 1101. Courts thus hold that owners are not bound by the charterer/carrier's bills of lading unless they authorize or ratify them, absolving the owners of liability but leaving their ships on the hook. COGSA addresses the responsibilities and liabilities of the "ship" as well as of the COGSA carrier. *See, e.g.*, COGSA §§ 3-4, 46 U.S.C. §§ 1303, 1304 (1988).

Furthermore, liens follow the vessel into new ownership, leaving the vessel exposed to *in rem* liability without fault of her new owner. Liens remain with the vessel until they are extinguished by suit *in rem*, by laches, or by judicial sale. If a vessel is sold by judicial sale, all liens not filed in the proceeding will be extinguished by the sale. *Gulf Oil Trading Co. v. Creole Supply*, 596 F.2d 515, 521 (2d Cir. 1979); *Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 866 (5th Cir. 1958). But a vessel sold privately or by a court which does not have actual possession will not be freed of liens, and the new

owner may find its vessel arrested on the basis of a presale lien. *Moran v. Sturges*, 154 U.S. 256, 285 (1894); *Thorsteinsson v. M/V DRANGUR*, 891 F.2d 1547, 1553 (11th Cir. 1990).

That the vessel can be liable *in rem* without corresponding *in personam* liability in her owner demonstrates why admiralty law for centuries has personified the vessel and viewed her as a juristic entity, rather than, as petitioner urges, mere property. Consider, for example, Chief Justice Marshall's statement of the law in dealing with a vessel declared forfeit for making a prohibited call in a foreign port:

> "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. The Little Charles, 1 Brock. 347, 354, Fed. Cas. No. 15,612."

The JOHN G. STEVENS, 170 U.S. at 121.

Justice Story on many occasions was this Court's voice on matters of admiralty law. On one such occasion he wrote for the Court:

> "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offence be malum prohibitum or malum in se. The same principle applies to proceedings in rem on seizures in the admiralty."

Id. (quoting *The PALMYRA*, 25 U.S. (12 Wheat.) 1, 14 (1827)).

Again, Justice Story:

> "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the

> vessel in which and by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof."

Id. (quoting *The MALEK ADHEL*, 43 U.S. (2 How.) 210, 233-34 (1844)). For centuries the law has viewed the vessel as the offending thing, regardless of whether her owner too was at fault. When a lien born of liability arises, the defendant charged with liability is the vessel *in rem*, not her owner.

The procedure for enforcing maritime liens by suit *in rem* against offending vessels recognizes and preserves the fundamental concept of the vessel *qua* defendant. *See* the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. Supp. Rules, 28 U.S.C. (1988). This Court promulgated the admiralty rules currently in use in 1920. But the procedures for suing a vessel are much older than that:

> Congress authorized the Supreme Court to develop such rules in 1792. It reiterated the peculiar nature of admiralty law and instructed adherence to rules and usages of admiralty rather than those of common law courts.

Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 732 F.2d 1543 (11th Cir. 1984), *modified on other grounds on reh'g en banc*, 773 F.2d 1528 (11th Cir. 1985).

The distinction made in the supplemental rules between vessel and owner is seen most clearly by contrasting Rule C with Rule B(1). Rule C permits the arrest of a vessel to enforce a maritime lien against her. Supp. R. C(1). Rule B(1), on the other hand, provides a means of obtaining jurisdiction over the person of a defendant to a

maritime claim who is not found within the district. Supp. R. B(1).

The right to arrest and sue the ship under Rule C does not depend on a right to sue her owner. It depends solely on the existence of a maritime lien against the vessel. Nor does the Rule C arrest confer jurisdiction over the person of the owner. On the contrary, the owner or other claimant of the vessel may enter a "restricted appearance" to claim the vessel without subjecting itself to the court's jurisdiction. Supp. R. E(8). *See, e.g., Teyseer Cement Co. v. Halla Maritime Corp.*, 794 F.2d 472, 477-78 (9th Cir. 1986). Moreover, the owner of an arrested vessel is not even entitled to appear to defend the vessel unless and until it files a claim to the vessel under Supp. R. C(6). *Sanchez v. United States*, 781 F. Supp. 835, 837 (D.P.R. 1991), *aff'd mem.*, 976 F.2d 724 (1st Cir. 1992); *United States v. Certain Real Property & Premises Known as 218 Panther St.*, 745 F. Supp. 118, 120 (E.D.N.Y. 1990), *aff'd sub nom. United States v. Eng*, 951 F.2d 461 (2d Cir. 1991).

On the other hand, Rule B(1) provides a means, in a case involving an admiralty and maritime claim, to obtain personal jurisdiction over a person other than a vessel for purposes of an *in personam* claim. It provides for attachment or garnishment of the person's property in the district as a means of procuring personal jurisdiction. *See* appendix B, App. 2. This is analogous to the old *quasi in rem* jurisdiction that permitted a party to obtain personal jurisdiction by attaching a person's property. If this *quasi in rem* jurisdiction were all that the rules provided, petitioner might rightly argue that the vessel (and the substituted security) is simply its personal property, and nothing more. If petitioner's equation of the owner with the vessel and its characterization of the vessel as mere

security were correct, then Rule B(1) would be entirely sufficient, and Rule C – which contemplates suits against the vessel – would be unnecessary. The fact that Rule C exists disproves petitioner's thesis.

The liability at issue on this petition is not the owner's, but the vessel's; indeed, it is not clear who the owner is.[6] The HANJIN YOSU's liability and the resulting judgments against the vessel were based on maritime liens, and she was a defendant in her own right:

> Under traditional doctrines of maritime law, a vessel such as the S/S OLIVER DRESCHER may be held liable for its torts and contracts even though its owner may not. . . . The lien arising from such wrongs creates an interest in the vessel, which is treated as a legal entity for this purpose.

Seguros Banvenez, S.A. v. S/S OLIVER DRESCHER, 761 F.2d 855, 863 (2d Cir. 1985)(citations omitted).

> Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court.

Canadian Aviator, 324 U.S. at 224 (citations omitted).

Petitioner's argument confounds the *in rem* liability of the vessel with *quasi in rem* jurisdiction over her owner. Liability and jurisdiction are not identical, either conceptually or in the Supplemental Rules. The judgments against the M/V HANJIN YOSU may be enforced only against the vessel (now the substituted security); they may never be enforced against her owner.

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[6] *See* discussion in point 4 *infra*, pp. 27-29.

In arguing that vessel and owner are one and the same legal entity, Pet. at 19, petitioner notes that when judgments have been entered against a vessel *in rem* and against her owner *in personam*, a discharge of the judgment debt of the owner must necessarily discharge the judgment debt of the vessel *in rem*. Pet. at 21. This is correct, but not for the reason petitioner suggests. Payment of either judgment discharges the other, but not because the owner and vessel are identical; they are not. As respondents explained in the supplemental memorandum requested by the Ninth Circuit, a vessel's liability *in rem* derives from the *in personam* liability of her owner or other person in lawful possession. *F/V FJORD*, 892 F.2d at 763. Appellees' Supp. Memo. at 5 n.3. Payment of either judgment discharges the other when both judgments were based on the same loss, for which the vessel and owner were both held liable.

Having held that petitioner and the M/V HANJIN YOSU are not the same juristic entity, the Ninth Circuit applied this Court's ruling in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), and held that because the vessel was not named in the notice of appeal, there was no jurisdiction to hear the appeal from the judgment against her. This Court in *Torres* held that Fed. R. App. P. 3(c) is jurisdictional, 487 U.S. at 315, and that the failure to name a party in a notice of appeal is more than an excusable informality: "it constitutes a failure of that party to appeal." *Id.* at 314.

Petitioner charges that the determination that the M/V HANJIN YOSU was a party in the district court and was not named in the notice of appeal is in conflict with decisions of the Fifth and Tenth Circuits interpreting *Torres*. Petitioner indicates that the Ninth Circuit's ruling

conflicts with the decisions in *King v. Otasco Inc.*, 861 F.2d 438 (5th Cir. 1988), *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992) and *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990). There is no such conflict. *King*, *Tinkler* and *Brown* do not hold that a vessel defendant and her owner are one and the same party. Each concerns an individual who brought claims in the district court in more than one capacity. These cases hold that the individual need not name herself separately for each of her representative capacities in which she takes an appeal. In the case at bar, the M/V HANJIN YOSU appeared as a defendant; she appeared as well in the briefs filed in the court of appeals. Moreover, as discussed in point 4 *infra*, there is nothing in the record to show that petitioner ever qualified as the legal representative of the vessel.

4. Since petitioner did not establish that it owned the M/V HANJIN YOSU and did not file a claim to the vessel, it cannot be heard to say that it filed the notice of appeal in the capacity of claimant of the vessel.

Although it appears on this petition "for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU)," there is no evidence that petitioner is a proper claimant to the vessel.

Petitioner states that it "appeared in the lawsuit in two capacities – as the *in personam* defendant and as a claimant to the *res* (which was a fund, *not* a vessel)."[7] Pet.

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[7] Petitioner points to the fact that security was substituted for the vessel, as contemplated by Fed. R. Civ. P. Supp. R. E(5). This does not mean, however, that the security became the defendant, as petitioner suggests. The vessel remained the

at 19. But the record below does not reflect that petitioner filed a claim to the vessel, as required by Fed. R. Civ. P. Supp. R. C(6)[*see* this brief, appendix B, App. 6]. There is no evidence of record on which petitioner may predicate its claim to the vessel or status as a claimant. There are only the contradictory averments of petitioner and another entity, Hanjin Shipping Company, Ltd., that each was the vessel owner.

The records of this proceeding and of *Hanjin Container Lines, Inc. v. Tokio Marine & Fire Ins. Co.*, 499 U.S. 461, reveal that petitioner and Hanjin Shipping Company, Ltd. simultaneously asserted – each in different proceedings in 1991 – that it was formerly known as Korea Shipping and was the owner of the M/V HANJIN YOSU (ex KOREAN WONIS ONE). Korea Shipping claimed the vessel in the limitation action, No. 90-1329, but neither petitioner nor Hanjin Shipping Company, Ltd. filed a claim to the vessel in this proceeding, though both were named as defendants herein. The record of this proceeding reflects no evidence to substantiate the contradictory averments of petitioner and Hanjin Shipping Company, Ltd. that each succeeds to the name of Korea Shipping and that each owns the vessel.

The fact that Korea Shipping filed a limitation proceeding is not sufficient to constitute a claim in the *in rem* action below. Supp. R. C(6) specifically requires the filing of a claim as a precondition to defending the vessel. Moreover, a limitation proceeding is an *in personam* action which deals only with the liability of the owner. *See In re Independent Towing Co.*, 242 F. Supp. 950, 953-54 (E.D. La.

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defendant; the security merely secured the vessel's freedom from arrest and detention *in custodia legis*.

1965); *see also* Supp. R. F and 46 U.S.C. § 181. A limitation proceeding is an equitable action, not one against the vessel and her freights. *Morrison v. Dist. Ct. of United States*, 147 U.S. 14, 34 (1893).

This Court may therefore conclude that petitioner has failed to demonstrate that it owned the vessel, or claimed the vessel, or ever acquired the status of claimant of the vessel. It should be noted that the absence of evidence of ownership does not affect a court's jurisdiction or its power to adjudicate the merits of an *in rem* claim against a vessel. For example, in *Melwire Trading Co. v. M/V CAPE ANTIBES*, 811 F.2d 1271 (9th Cir.), *amended on other grounds*, 830 F.2d 1083 (9th Cir. 1987), the district court and court of appeals addressed the liability of the vessel *in rem* where it was "not apparent from the pleadings" who the owner was. 811 F.2d at 1273.

CONCLUSION

Petitioner presents three questions for review, but fails to demonstrate a special and important reason for granting issuance of a writ of certiorari as to any one of them. In its first question, petitioner claims that the Ninth Circuit's decision conflicts with decisions of the First and Second Circuits. But there is no conflict: When two bills of lading covering the same goods are issued by different parties – the NVOCC and the ocean carrier – all these courts of appeals hold that each party may be sued only under the bill of lading that it issued. Petitioner's second question asserts that goods shipped in packages cease to be in packages when placed in a container. Petitioner cites no law for this view and does not explain why it should not be required to pay for the number of packages

specifically stated in its bills of lading. Petitioner's third question claims that the decision conflicts with prior rulings of this Court and with decisions of the Fifth and Tenth Circuits. Since the days of Chief Justice Marshall this Court has held vessels liable *in rem* regardless of the liability *vel non* of their owners, and this Court's Supplemental Rules provide the means of enforcing those claims. The cases cited from the other circuits concern individuals appearing in representative capacities. They do not address a vessel that was sued as a defendant, appeared as a defendant and appellant, and has no apparent claimant. Thus, there are no conflicts.

The petition fails to disclose any conflicts between or among circuits or with any decision of this Court, any important questions of federal law to be settled, or any other special and important reasons which would justify a writ of certiorari. Respondents request respectfully that the Court deny the petition.

DATED: February 21, 1994

Respectfully submitted,

MICHAEL W. LODWICK
FISHER & PORTER

Attorney for Respondents

APPENDIX A

Carriage of Goods by Sea Act, § 3(4), 46 U.S.C. § 1303(4)(1988):

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Carriage of Goods by Sea Act, § 3(8), 46 U.S.C. § 1303(8)(1988):

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

APPENDIX B

Supplemental Rules for Certain Admiralty & Maritime Claims, Rule B(1), Fed. R. Civ. P. Supp. R. B:

Rule B. Attachment and Garnishment: Special Provisions

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by the affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

Supplemental Rules for Certain Admiralty & Maritime Claims, Rule C, Fed. R. Civ. P. Supp. R. C:

RULE C. Actions in Rem: Special Provisions

(1) **When Available.** An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) **Complaint.** In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Judicial Authorization and Process. Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for

forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.